

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)

Implementation of Local Competition)
Provisions in the Telecommunications)
Act of 1996)

CC Docket No. 96-98

Interconnection between Local)
Exchange Carriers and Commercial)
Mobile Radio Service Providers)

CC Docket No. 95-185

COMMENTS
OF THE IOWA UTILITIES BOARD

The Iowa Utilities Board (IUB) submits the following comments in response to the *Second Further Notice of Proposed Rulemaking*, released on April 16, 1999. The Board proposes a workable set of standards and procedures to determine what network elements must be unbundled. The standards recognize both the unbundling requirements of 47 U.S.C. § 251(c)(3) and the Supreme Court's admonition in *AT&T v. Iowa Utilities Board*, 119 S.Ct. 721 (1999), to give more effect to the "necessary" and "impair" standards in § 251(d)(2). The Board's aim is to propose standards that will be effective, but not so limiting that no network elements will be unbundled.

PROCEDURES

The procedures proposed by the Board are intended to make unbundled network elements available, within effective limits. The Board proposes that the Commission determine a core group of nationwide network elements to be

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unbundled. This determination is explicitly authorized in 47 U.S.C. § 251(d)(2). A nationwide list is essential in making the unbundled network element entry strategy viable. The difficulty in fostering such an entry strategy is shown by the small amount of unbundled network elements purchased by competitors in the first three years under the Act, even with what appeared to be a firm and comprehensive nationwide list of unbundled network elements available. Without a core list, this entry strategy may never be used to a significant extent.

In addition, the Commission's core nationwide list should be subject to change. Network elements should be added or removed by the state commissions pursuant to the record made before the commissions in proceedings to arbitrate and modify interconnection agreements. This change in procedures will require modifications to 47 C.F.R. § 51.317. As the Commission recognizes in numerous places in the *Second Further Notice*, there will be geographic variations in the availability of alternatives to unbundled network elements and the state commissions are best situated to examine local circumstances. The authority for the state commissions to add or remove is found in 47 U.S.C. § 251(d)(3), which authorizes the enforcement of state commission regulations, orders, or policies in the unbundling area if they are consistent with § 251 and do not substantially prevent implementation of § 251 and Part II of the Act.

The Board believes that, as a matter of comity, the Commission should not review state decisions adding or removing unbundled network elements from the national list, except in cases where the removal of the element would create

a barrier to entry prohibited by § 253. State decisions to add or remove will be made in proceedings to arbitrate or modify interconnection agreements. Review of state commission decisions concerning interconnection agreements is by federal district courts pursuant to § 252(e)(6). Commission review would promote forum shopping and frustrate the orderly review of interconnection agreements by the federal district court. For that reason, Commission review should be limited to the very unusual situation, contemplated in § 253, where removal of an element from the list would effectively prohibit a competitor from providing a service.

In proceedings before a state commission to require an additional network element to be unbundled, the burden of proof should be on the competitor to show that the appropriate standard discussed below is satisfied. The exception is that the incumbent LEC should bear the burden of showing that a network element is proprietary in nature. In proceedings to remove a network element from the list, the burden of proof as to both the proprietary nature of the network element and the satisfaction of the appropriate standard should be on the incumbent LEC. The proponent of either an addition or subtraction will initially define the geographic area within the state where the state commission's ruling will apply, but that area may be modified during the proceedings.

The Commission's "necessary" and "impair" standards as discussed below must apply to both the Commission's determination of the core group of nationwide unbundled network elements and to state commission determinations of additions and subtractions. In this way, all the unbundling decisions will

comply with consistently applied standards, will not suffer the deficiencies found in *AT&T v. Iowa Utilities Board*, and will satisfy the intent of the Act.

STANDARDS

Turning now to the unbundling standards, the Board agrees with the Commission's understanding that the "necessary" standard applies only to network elements that are "proprietary" in nature. *Second Further Notice of Proposed Rulemaking*, ¶ 19. The Board believes that the unequivocal duty to unbundle provided in § 251(c)(3) and the language in § 251(d)(2)(A) addressing network elements proprietary in nature (and not network elements merely containing a proprietary component) warrant a narrow definition of "proprietary." Therefore, the Board urges the Commission to continue to consider network elements non-proprietary if their interfaces, features, functions, and capabilities are defined by recognized industry standard-setting bodies, defined by Bellcore general requirements, or widely available from vendors. Also, a network element without the protection of patent, copyright, or trade secrecy laws should not be considered proprietary. Finally, the Board is concerned that in the environment created by the Supreme Court's decision incumbent LECs may attempt to use claimed third-party proprietary interests as a barrier to unbundling. While the rights of third parties cannot be ignored, the general duty of incumbent LECs to unbundle requires that means be found to satisfy third parties while making unbundled network elements available.

Because the Board seeks to make unbundled network elements available to the full extent permitted under the Act, the Board recommends that the

Commission not adopt the "essential facilities" doctrine as developed in antitrust case law. That doctrine provides a standard that is too restrictive for this context, where Congress intended to encourage competitive entry through the use of unbundled network elements. Instead, the Board proposes the "necessary" standard for requiring the unbundling of a proprietary network element as follows:

A proprietary network element must be unbundled if no economically and technically feasible alternative is available, either by self-provisioning or from other sources, that will allow efficient competitors to provide service at competitive rates and service quality.

The "impair" standard for requiring the unbundling of a nonproprietary network element should be somewhat less restrictive than the "necessary" standard. Therefore, the Board would replace "economically and technically feasible" with "practical" as the descriptive modifier of "alternative." Also, the Board would replace "efficient" with the more expansive "disparate" as the descriptive modifier of "competitors." The effect is that the "necessary" standard requires a more rigorous showing of competitive need, while the "impair" standard requires a reduced showing of need. The Board proposes the following standard to determine when the failure to provide access to a nonproprietary network element would "impair" the ability of a competitor to provide a service:

A nonproprietary network element must be unbundled if no practical alternative is available, either by self-provisioning or from other sources, that will allow disparate competitors to provide service at competitive rates and service quality.

These standards explicitly satisfy the Supreme Court's requirement that the Commission consider the availability of elements outside the incumbents'

networks in determining whether unbundling satisfies the "necessary" and "impair" tests. The standards also are tied directly to the role played by the network element in providing competitive services, which is the primary goal of the Act.

NATIONWIDE LIST OF UNBUNDLED NETWORK ELEMENTS

The Commission requested that parties apply their proposed standards to the loop and the other six network elements previously identified. In this regard, the Board believes it is reasonable to separate the seven network elements into two groups--those elements included in the § 271(c)(2)(B) competitive checklist for Bell operating companies and those not included in the checklist. The network elements that must be unbundled to satisfy the § 271 checklist are the loop, local transport (interoffice transmission), local switching, directory assistance and operator services, and access to databases and associated signaling networks. Congress showed its strong commitment to the competitive need for the unbundling of these network elements by forbidding the Commission to forbear in this area until the checklist has been fully implemented. 47 U.S.C. § 160(d). The Board believes that potential market entrants everywhere wishing to use unbundled network elements continue to have a strong competitive need and little in the way of alternatives for these most basic elements of the incumbent LEC's networks. In Iowa at this time, there are few, if any, geographic areas where competitors could compete effectively using alternatives to these network elements. The network elements from the § 271 checklist easily satisfy

even the "necessary" standard and should continue to be on the nationwide unbundled network elements list, even if they are proprietary.

The unbundled network elements in § 51.319 that are not on the § 271 checklist require closer scrutiny, because Congress has not spoken as to whether they must be unbundled. The Board believes that operations support systems, service management systems, and tandem switching generally are not proprietary in nature and that they satisfy the "impair" standard, because there are no practical alternatives available for many competitors. The competitive need for operations support systems and service management systems also is sufficient to satisfy the "necessary" standard, if these network elements are determined to be proprietary in nature.

There appears to be no disagreement among regulators that nondiscriminatory access to incumbent LEC operations support systems is a near absolute prerequisite to competition in the local exchange service market. Whether a competitor wishes to use resale, all unbundled network elements, or a combination of unbundled network elements and its own facilities, it will be impossible to provide reliable service without access to the incumbent LEC's databases and information that support pre-ordering, ordering, provisioning, maintenance and repair, and billing functions. Access to operations support systems easily satisfies the "impair" standard for unbundling. It is so essential to competition that if the Commission determines access to operations support systems is proprietary in nature, this network element would satisfy the "necessary" standard as well.

Service management systems were grouped in the § 51.319 list with signaling networks and call-related databases. While not specifically listed in the § 271 checklist, service management systems are integrally related to signaling networks and call-related databases. Without the information, instructions, and capabilities provided by service management systems, competitors using unbundled network elements to provide service will be unable to process and complete a telephone call and enter and store data regarding the call. Because service management systems are so integrally related to signaling networks and call-related databases, no alternative is available to a competitor using those unbundled network elements. The failure to unbundle service management systems would eliminate such a competitor's ability to provide service. Service management systems satisfy the "necessary" standard.

Tandem switching capability is necessary for trunk termination, to connect trunks to trunks, for call recording, for the routing of calls to operator services, and for access to signaling conversion features. Once again, the Board believes that a competitor providing service through unbundled network elements will be unable to accomplish these functions without access to the incumbent LEC's tandem switching capability. Self-provisioning or purchasing the tandem switching capabilities from other sources are not practical alternatives for many potential competitors. The Board believes tandem switching satisfies the "impair" test and should be on the nationwide list of network elements required to be unbundled.

The network interface device has been treated differently in Iowa from the other six unbundled network elements on the § 51.319 list. It has been unbundled and priced as a part of the unbundled local loop, without objection, in interconnection agreements and in proceedings conducted under the authority of state law. The Board has little information on the availability of alternatives to the network interface device as a network element. In general, it appears to be appropriate to include the network interface device in the loop and leave subloop unbundling issues for the state commissions to sort out consistent with local competitive needs.

Another network element that the Board has addressed in arbitration proceedings and on judicial review has been dark fiber. In paragraph 34 of the *Second Further Notice*, the Commission asked if it should modify the definition of loops or transport to include dark fiber. That approach has some appeal, but the competitor purchasing the use of dark fiber is purchasing unused facilities that currently are not loops and not transport. Dark fiber meets the definition of a network element, but it is a stretch to label it a loop or a trunk while it is unlit. The Board believes dark fiber should be included on the nationwide list of unbundled network elements in its own right. As local service competition begins to broaden, many situations will develop where a particular competitor will need to use the incumbent LEC's dark fiber to be able to provide a service at a competitive price or with a technological advantage. The Board believes that dark fiber generally satisfies the "impair" test as a network element that should be unbundled on a nationwide basis. However, dark fiber appears to be an

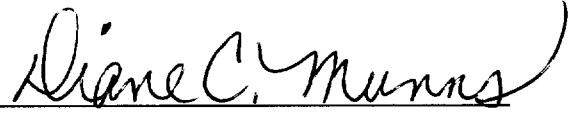
unbundled network element where the incumbent LEC may in some specific circumstances, be able to show the state commission that practical alternatives to the incumbent LEC's dark fiber are available.

CONCLUSION

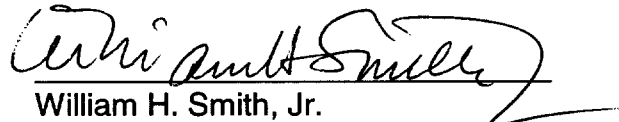
The Board proposes that the Commission adopt the "necessary" and "impair" standards listed above for determining what network elements are required to be unbundled. The standards should be applied by the Commission to determine a national list of unbundled network elements and by state commissions in adding or subtracting unbundled network elements from the national list. The national list should include the loop, including the network interface device as part of the loop; local transport; local and tandem switching; access to operator services and directory assistance; access to signaling networks, service management systems, and call related databases; access to operations support systems; and dark fiber. Commission rules at § 51.317

should be revised to provide for state commissions to add or subtract from the nationwide list pursuant to the authority in 47 U.S.C. § 251(d)(3).

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